Vons Grocery Company *and* Gerald R. Moerler *and* Wholesale & Retail Food Distribution, Teamsters Local 63, affiliated with International Brotherhood of Teamsters, AFL–CIO *and* Larry Leland Campbell and Quality Circle Group. Cases 21–CA–28816, 21–CA–29084, 21–CA–29085, 21–CA–29086, and 21–CA–29202

December 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On June 28, 1994, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.

1. The complaint alleges that the Respondent created and dominated an entity known as the ''Quality Circle Group'' (QCG) in violation of Section 8(a)(2). The judge found that the QCG was not a labor organization within the meaning of Section 2(5) of the Act and, therefore, he found that the Respondent did not violate Section 8(a)(2). For the reasons set forth below, we affirm.

The Respondent's truckdrivers are represented by Teamsters Local 63 (the Union). The QCG is an outgrowth of the Respondent's ''round table'' meetings, an employer-employee discussion group that has been in existence since 1983. Over time, nearly all drivers have been asked to participate in the round table meetings. The QCG was created at the suggestion of an employee in November 1989. It is an employee participation group devoted to considering specific operational concerns and problems. The QCG identifies operational problems and researches ways to address and solve these problems.

There is no contention that the creation of the QCG in 1989 or its functioning in any way interfered with the Union's role as the exclusive collective-bargaining representative of the Respondent's employees. Indeed, for almost 3 years, the QCG dealt purely with operational matters. In the summer of 1992,[2] the QCG strayed for the first time from considering operational matters to considering a dress code and an accident point system—subjects that had been discussed in the past by the Respondent and the Union.[3] On September 3, after two discussions with the Respondent's transportation manager, Darwyn Jones, the QCG submitted proposals for a dress code and an accident point system to the Respondent's vice president of transportation, Dick Maron.

By letter dated September 11, the QCG invited Union President Bob Molina to attend a QCG meeting to be held on September 17. Molina attended the meeting and was presented with the proposals on dress code and accident point policy for the first time. The Respondent and the Union subsequently considered both proposals in their regularly scheduled negotiation meetings. The dress code was implemented in early 1993, but no agreement was reached on the accident point system.

By letter dated December 3, the Union complained that the QCG had ''gone way beyond the scope of their activity and have now infringed on the rights exclusively reserved'' to the Union. By letter of December 22, the Respondent informed the Union that the format of the QCG had changed so that a union steward could attend all meetings. It told the Union that the QCG ''will not infringe on any of your rights and responsibilities as bargaining agents.''

In *E. I. du Pont & Co.*, 311 NLRB 893 (1993), the Board set forth certain criteria and guidelines applicable to circumstances, as here, in which employees are represented by a union and the issue to be decided is whether the employer and the group at issue have been ''dealing with'' one another. The Board in *Dupont* described ''dealing with'' as a bilateral mechanism between two parties that entails a pattern or practice of the making of proposals by an employee group and the acceptance or rejection of those proposals by management. The Board said:

> That ''bilateral mechanism'' ordinarily entails a *pattern or practice* in which a group of employees, *over time*, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required. If the evidence estab-

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates are in 1992 unless otherwise indicated.

[3] The complaint does not allege that the Respondent violated Sec. 8(a)(2) prior to June 1992. Further, the General Counsel filed no exceptions to the judge's findings that (1) it was not until it became involved in the shorts and the driver accident policy that the QCG began to encroach on Secs. 2(5) and 8(d) matters pertaining to terms and conditions of employment; and that (2) until the summer of 1992, the QCG did not concern itself with matters that are part of the definition of a Sec. 2(5) labor organization, i.e., ''grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work,'' but focused instead on operational matters.

> lishes such a *pattern or practice*, or that the group exists for a purpose of following such a *pattern or practice*, the element of dealing is present. However, if there are only *isolated instances* in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing. [311 NLRB at 894, emphasis added.][4]

The QCG at issue here did not have ''a pattern or practice'' of making proposals to management on subjects listed in the statutory definition of labor organization. Instead, the proposals on a dress code and an accident point policy were an isolated incident in the long life of the QCG. For nearly 3 years, the QCG existed lawfully in the Respondent's unionized work force as a group devoted to operational matters. Then, on one and only one occasion, the QCG developed proposals on matters involving conditions of work such as a dress code and an accident point policy. Even on that occasion, the Union was informed of the proposals and brought into the consideration of them before any decision was made. Indeed, the Union pursued the proposals in negotiating sessions with the Respondent and the QCG gave up any further role with regard to the proposals. When the Union complained, several months later, that the QCG was infringing upon the Union's rights as exclusive bargaining representative, the Respondent immediately changed the format of the QCG to include a union steward at each meeting and assured the Union that the QCG would not infringe on any of the Union's rights.

One incident of making proposals on conditions of work does not constitute a pattern or practice of dealing with the employer within the meaning of Section 2(5).[5] Further, the Respondent's immediate response to the Union's complaint indicates that there is little likelihood that the one incident will develop into a pattern. Thus, the QCG's format has been changed to ensure the presence of a union steward at its meetings so that the group can and will confine itself to appropriate operational concerns in the future. Further, the Respondent specifically has assured the Union that the QCG will not infringe on the Union's rights.[6]

In sum, we do not believe that this one incident should transform a lawful employee participation group into a statutory labor organization. We do not believe that what happened here poses the dangers of employer domination of labor organizations that Section 8(a)(2) was designed to prevent. Accordingly, we find that the General Counsel has not established that the QCG had a pattern or practice of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. We conclude that the QCG was not a labor organization within the meaning of Section 2(5), and that the Respondent, therefore, did not violate Section 8(a)(2) by its involvement with the QCG.[7]

2. The judge found that the Respondent did not violate Section 8(a)(1) by restricting the posting of materials on its employee bulletin boards. We disagree.

The Respondent has traditionally provided space at its facilities for various bulletin boards: a company bulletin board used for management notices to employees; a union bulletin board used for union notices to employees; an employee bulletin board; and, most recently, a Quality Circle Group (QCG) bulletin board. In June 1992, the Respondent advised employees that the employee bulletin board would be locked because ''negative notices'' were being posted and that permission now had to be obtained for postings of ''personal advertising'' on that bulletin board. The ''negative notices'' that prompted the Respondent's action were postings by employee Gerald Moerler concerning a union-sponsored employees' vote on a proposed change in work schedules, matters pertaining to the advisability of the QCG, and comments regarding working conditions directed to the Respondent's stockhold-

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[4] Chairman Gould agrees in substantial part with this analysis of the term ''dealing with'' under Sec. 2(5). It is a reasonable construction of the Act that allows employers and employees to explore cooperative efforts without the fear that one error or isolated incident will transform a genuine attempt to cooperate into the unlawful domination of a labor organization. *Stoody Co.*, 320 NLRB 18 (1995) (Chairman Gould's separate statement at 20 fn. 10.)

[5] For the reasons set forth in his separate statement in *Stoody Co.*, at 20 fn. 11, in Chairman Gould's view the *du Pont* decision was in error to the extent that it treated the subjects listed in Sec. 2(5) as interchangeable with mandatory subjects of bargaining. Chairman Gould thinks the better policy is to compel bargaining on all subjects bearing some nexus to the employment relationship and not to make the artificial distinction between mandatory and nonmandatory subjects. See William B. Gould IV, Agenda for Reform: The Future of Employment Relationships and the Law (MIT Press, 1993), pp. 170–173. Under his view, both subjects of bargaining and subjects defining a statutory labor organization should be construed expansively. That, however, is not the current state of the law and for this reason, he believes it is not correct to interchange mandatory subjects of bargaining under Sec. 8(a)(5) with the subjects listed under Sec. 2(5) as *du Pont* appears to have done.

Member Cohen's views on this matter are set forth in fn. 14 of *Stoody Co.*

[6] Chairman Gould has long believed an interpretation of the Act that would not discourage employee participation programs can lead to the achievement of true democracy in the workplace. See Chairman Gould's concurrence in *Keeler Brass Co.*, 317 NLRB 1110, 1116 (1995), and works cited therein. *Stoody Co.*, supra (Chairman Gould's separate statement at 20 fn. 12.) The Board's decision here is consistent with that view.

[7] Because the QCG's involvement with working conditions was isolated and occurred in the context of a lawful employee participation group, as described above, we also adopt the judge's finding that the Respondent did not bypass the Union and deal directly with employees in violation of Sec. 8(a)(5) and (1).

ers.[8] Later that year, the Respondent advised employees that the employees' bulletin board was to be used only for advertisements and personal messages regarding drivers who were ill or retired and that there would be a limit of 30 days for each posting.

The employees' bulletin board historically has been used for the posting of personal matters, generally advertisements for the sale of personal items such as cards and babysitting services, as well as the posting of social announcements and newspaper and magazine articles.[9] There is no specific evidence that the Respondent had ever maintained or published a rule applicable to employee bulletin boards requiring advance approval of postings or a rule addressed to the propriety of postings based on their content, before the posting of the June 1992 restrictions (other than during the 1991 intraunion election campaign, discussed supra, fn. 9).

In *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 406 (8th Cir. 1983), the Board summarized the prevailing legal principles applicable to bulletin board postings, as follows:

> The legal principles applicable to cases involving access to company-maintained bulletin boards are simply stated and well-established. In general, ''there is no statutory right of employees or a union to use an employer's bulletin board.'' However, where an employer permits its employees to utilize its bulletin boards for the posting of notices relating to personal items such as social or religious affairs, sales of personal property, cards, thank you notes, articles, and cartoons, commercial notices and advertisements, or, in general, any nonwork related matters, it may not ''validly discriminate against notices of union meetings which employees also posted.'' Moreover, in cases such as these an employer's motivation, no matter how well meant, is irrelevant. [Footnotes omitted.]

Accordingly, once an employer has furnished to employees space to post items of interest, it may not impose content-based restrictions that discriminate between postings of Section 7 matters and other postings. See also *Central Vermont Hospital*, 288 NLRB 514 (1988); *Amelio's*, 301 NLRB 182, 189–190 (1991). These principles, however, are not inflexible. Thus, if the employer has not knowingly permitted employees to post personal items, *Miller Brewing Co.*, 311 NLRB 1364 fn. 2 (1983), or the posting at issue is unduly personal and is not a matter of mutual interest to other employees, *Mr. Potty, Inc.*, 310 NLRB 724, 729 (1993), or the posting creates a battleground between competing factions of employees that would require the employer to police the bulletin board to ensure fairness in space allocation between the factions, then restrictions may be permissible. See *Arkansas-Best Freight System*, 257 NLRB 420, 423 (1981), enfd. 673 F.2d 228 (8th Cir. 1982).[10]

In the instant case, it is evident that the Respondent has permitted employees to utilize its employee bulletin board for postings, but that starting in June 1992 it applied a content-based policy directed to matters pertaining to workplace issues. Although the Respondent characterized employee Moerler's postings as ''negative notices,'' nothing in his postings was inflammatory in character or reasonably likely to create the kind of problems that would privilege the Respondent's disparate content-based policy.[11] Accordingly, we find that the Respondent violated Section 8(a)(1) by singling out Moerler's postings and implementing content-based limitations, pertaining to Section 7 activities, for postings on the employee bulletin board.[12]

3. The complaint alleges that the Respondent violated Section 8(a)(1) when, in November 1992, employee Will Lopez, a senior member of the QCG, allegedly made a death threat to employee Moerler. The judge dismissed this allegation. We agree, for the following reasons. According to Moerler, Lopez confronted him about a flyer that Moerler had made and distributed that disparaged Lopez personally regarding

[8] The posting on the work schedule vote stated that at a local ''drivers' craft meeting,'' the proposal was rejected. The posting pertaining to the QCG was an excerpt from a periodical discussing labor-management cooperative programs with a handwritten notation that the subject was similar to the Respondent's program. The posting directed to stockholders concerned various complaints regarding working conditions and the Respondent's policies.

[9] In 1991, pursuant to a settlement agreement between the Respondent and a court-created independent administrator overseeing international union elections that included the Respondent's unit employees, the Respondent agreed to the posting of partisan intraunion campaign notices on its employee bulletin boards. The Respondent initially had refused to permit such postings. We do not view the period of these postings as either establishing a specific practice allowing nonpersonal employment-related postings or a practice disallowing such postings inasmuch as the practice was a temporary one enacted pursuant to a settlement agreement arising from the oversight of International union elections.

[10] We disagree with the judge that *Arkansas-Best Freight System* is not factually distinguishable from *Nugent Service*, 207 NLRB 158 (1973). Indeed, the Board in *Arkansas-Best Freight System* expressly found that that case *was* distinguishable, a matter that the judge acknowledged here but then ignored.

[11] As discussed at sec. 3, Moerler and another employee were involved in a confrontation in November 1992, several months after the Respondent's initial limitation on postings. Although one of Moerler's postings that was removed pertained to the QCG—the subject matter that later precipitated the November confrontation—that posting was not inflammatory or comparable to the flyer prepared by Moerler that preceded the November confrontation.

[12] Although we adopt the judge's additional finding that the Respondent did not violate Sec. 8(a)(5) by its restrictions on the employees' bulletin board, we do so only on the basis that there is no evidence that the Union specifically has sought to bargain over any matters pertaining to the employee bulletin board and that the Union historically has bargained only over its own separate union bulletin board.

his involvement in the QCG and the purported role of the QCG in causing layoffs. Moerler testified that Lopez stated ''that I would have to deal with him later'' and that ''you better worry about your life.'' When Moerler asked Lopez what he meant by the latter remark, Lopez stated, according to Moerler, that ''you just might get run over by a truck or something.''[13]

The General Counsel alleges that employee Lopez was an agent of the Respondent for purposes of this alleged threat because of Lopez' involvement in the QCG as its leading employee spokesperson and most senior and active employee member. The General Counsel contends that it was reasonable for Moerler and others present to believe that Lopez was reflecting company sentiment and acting for management when Lopez allegedly threatened Moerler.

Conduct of an employee may be attributable to an employer under the agency principle of apparent authority when, under all the circumstances, employees would reasonably believe that the employee in question is reflecting company policy and speaking and acting on behalf of management. *Great American Products*, 312 NLRB 962, 963 (1993); *Einhorn Enterprises*, 279 NLRB 576 (1986). We do not believe, under the circumstances here, that Moerler, or anyone else present, reasonably would believe that Lopez was reflecting company policy or speaking for management by making a serious personal threat of bodily harm toward Moerler. Although the subject precipitating the encounter concerned the QCG, the confrontation arose from Moerler's derogatory reference to Lopez personally. In essence, the encounter was a personal dispute between Moerler and Lopez. We do not believe that the encounter plausibly could be viewed as a reflection of any company policy pertaining to the creation or administration of the QCG. In these circumstances, employees would not reasonably believe that Lopez was speaking for management when he allegedly threatened Moerler's life. Accordingly, we shall dismiss this 8(a)(1) allegation.[14]

4. For the reasons set forth below, we adopt the judge's conclusions that the Respondent did not directly deal with employees and bypass the Union in violation of Section 8(a)(5) and (1) during a meeting with employees on June 11, 1992.

At a ''round table'' meeting on June 11, according to employee Moerler, Transportation Manager Jones asked a group of employees how they thought the Union's attorney was doing in connection with a pending grievance arbitration. The arbitration concerned the Respondent's award of certain work to another local union. Moerler testified that Jones also asked how the employees thought the arbitration was going. Later at that meeting, according to Moerler, Jones asked employees how they intended to vote on an upcoming employee vote, authorized by the governing collective-bargaining agreement, regarding whether unit employees should switch to a 4-day, 10-hour work schedule from the current 5-day, 8-hour schedule.

The General Counsel contends that Jones' inquiry regarding the pending arbitration was an attempt to gain inside information and an unfair advantage. Jones' inquiry, however, did not, on its face, seek any information that was of a confidential nature. Instead, he simply asked the employees' views on the progress of the arbitration and their assessment of the union attorney's performance. In these circumstances, we fail to discern how Jones' comments undermined or bypassed the Union's bargaining authority.

With respect to Jones' inquiries regarding how the assembled employees intended to vote on the possible change in work schedules, the General Counsel contends that the Respondent attempted to bypass the agreed-upon method of ascertaining employee support, contained in the collective-bargaining agreement, by polling the assembled employees. The Respondent, however, was not substituting its polling for that set forth in the bargaining agreement. The employees polled were but a small portion of the overall group of unit employees voting, and the Respondent was not usurping a contractual mechanism for determining employees' sentiment.

Most importantly, there is no showing that the polling was undertaken to ascertain surreptitiously the level of support among employees for a particular bargaining goal that the Respondent was formulating. Cf. *Harris-Teeter Super Markets*, 293 NLRB 743, 744–745 (1989); *Obie Pacific, Inc.*, 196 NLRB 458 (1972). Thus, the propriety of the 4-day, 10-hour work schedule already had been negotiated, and the bargaining agreement provided that a majority of affected unit employees must approve the 4-day, 10-hour schedule before it could be implemented. At most, the Respondent was seeking a ''preview'' of the upcoming scheduled vote, which required majority support before a change of schedule could be made, a result that the Respondent would ascertain eventually, in any case, under the terms of the bargaining agreement. As with the inquiries regarding the pending arbitration, we find the Respondent's inquiries concerning the upcoming vote did not undermine the Union's authority. Accord-

[13] Lopez' version of the events differs from Moerler's. The judge found that ''it is clear that Lopez did make remarks similar to those alleged in the complaint.''

[14] In dismissing this allegation, we rely on the absence of an agency relationship and not on any of the other factors relied on by the judge. We also do not pass on the question of, under what other circumstances, if any, an employee member of an employee participation group or committee can be an agent of an employer.

ingly, we shall dismiss the 8(a)(1) allegations arising from the June 11, 1992 meeting.[15]

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to rescind any rules or policies that prohibit employees from posting materials that pertain to terms and conditions of employment on its employee bulletin boards that are otherwise available for general use by employees and to cease and desist from totally prohibiting employees from distributing union campaign material.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Vons Grocery Company, Santa Fe Springs and El Monte, California, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraph.

''(b) Prohibiting its employees from posting materials and messages that pertain to the exercise of protected concerted activities, on employees' bulletin boards that are otherwise available for general use by employees.''

2. Insert the following as paragraph 2(a) and reletter the subsequent paragraphs.

''(a) Rescind any rules or policies that prohibit employees from posting materials that pertain to terms and conditions of employment, on employees' bulletin boards that are otherwise available for general use by employees.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT prohibit employees from posting materials and messages that pertain to the exercise of protected concerted activities, on employees' bulletin boards that are otherwise available for general use by employees.

WE WILL NOT totally prohibit employees from distributing campaign materials published by candidates for elective union office.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind any rules or policies that prohibit employees from posting materials and messages that pertain to the exercise of protected concerted activities, on employees' bulletin boards that are otherwise available for general use by employees.

VONS GROCERY COMPANY

Ami Silverman, for the General Counsel.
Gary Overstreet and *Philip Ewen (Musick, Peeler & Garrett)*, of Los Angeles, California, for the Respondent.
Kenneth Young (Wohlner), Kaplon, Phillips, Vogel & Young, of Encino, California, for Teamsters Local 63.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. I heard this case in Los Angeles, California, on November 18–19, 1993.[1] A consolidated amended complaint was issued by the Regional Director for Region 21 on May 5, 1993. It is based on unfair labor practice charges filed on July 15, 1992, by Gerald R. Moerler, an individual (Moerler); on December 3, 1992, by Wholesale & Retail Food Distribution, Teamsters Local 63, affiliated with International Brotherhood of Teamsters, AFL–CIO (the Union); and on February 11, 1993, by Larry Leland Campbell (Campbell), another individual. The Union's and Campbell's charges were subsequently amended. In its final version, the complaint alleges that Vons Grocery Company (Respondent) has committed certain violations of Section 8(a)(5), (2), and (1) of the National Labor Relations Act (the Act).

Issues

Several issues are raised by the complaint. The principal issue to be decided is whether or not the Quality Circle Group (the QCG) is a labor organization within the meaning

[15] We find it unnecessary to our analysis to consider the propriety of the judge's finding that the Respondent was indifferent to the outcome of the upcoming vote.

[1] Counsel for the General Counsel has filed a motion to correct the transcript. As it is unopposed, and as its proposed corrections appear to comport with the record, the motion is granted.

of Section 2(5) of the Act. If so, whether it is an organization unlawfully dominated by Respondent. Connected to the latter question is an allegation that a rank-and-file employee connected to the QCG made an unlawful threat of physical harm to Moerler and whether the threat has been proven. If so, I must determine whether Respondent is legally culpable.

In addition, the complaint asserts that Respondent, during a so-called Round Table meeting unlawfully polled employees and/or unlawfully bypassed the Union by directly bargaining with the employees in attendance.

Finally, there are three questions regarding the posting and/or distribution of literature ostensibly protected by the Act. First, Respondent is accused of unlawfully prohibiting employees, specifically Moerler, from using the employee bulletin board to post messages such as protesting the existence of the QCG, which the General Counsel characterizes as ''intra union.'' Second, the so-called promulgation of ''new'' bulletin board rules is said to be an unlawful unilateral change in working conditions. Third, Respondent is accused of prohibiting employees, Moerler and Campbell, from distributing the campaign literature of candidates for office in Local 63.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. All parties have filed briefs which have been carefully considered. Based on the entire record of the case as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties have stipulated that Respondent is a Michigan corporation, which operates several retail grocery chains and warehouses in southern California.[2] The facilities in question are two distribution centers located in Santa Fe Springs and El Monte. They have also stipulated that Respondent annually derives gross revenues in excess of $500,000 and annually purchases and receives goods in California directly from sources outside the State valued in excess of $50,000. Accordingly, they further stipulate that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

As an additional stipulation, the parties agree that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

As previously noted, Respondent in the course and conduct of its supermarket businesses operates several product distribution centers. The two which are involved here are those located in Santa Fe Springs and El Monte, California. At each location Respondent employs approximately 200 truckdrivers whose duties require them to deliver products from the distribution centers to the retail stores in their assigned areas of southern California. The drivers at these locations have been represented for collective-bargaining purposes by the Union and its predecessors since the 1940s. Over those years there have been many restructures as corporations developed and changed and as various locals underwent changes. Indeed, in the background of this case, are two such changes. In 1988, Respondent purchased the entire southern California division of the Oakland, California based Safeway Stores chain. The drivers of that firm had been represented by another Teamsters local and that event resulted in a merger of the two Teamsters locals, leaving Local 63 as the survivor. This change really did not affect bargaining circumstances because both Respondent, Safeway, and the two locals were participants in a multiemployer/multiunion collective-bargaining relationship.[3] Indeed, the relationship is so well established that ongoing standing committees exist which deal with the day-to-day problems which arise in such a large industry. It may fairly be said that this is a mature bargaining relationship. It also may be said that it is not free of problems but that parties seem to be willing to resolve them. In this sense, the purchase triggered the negotiations which ultimately led to merging the locals and dovetailing the seniority of the two driver groups.

In addition, during 1990–1991, the Union's parent International union was undergoing a reorganization under the auspices of court orders obtained by the United States Justice Department. Connected to that was an election of International officers. This was the first instance in which union members were permitted to directly vote for International officers. Furthermore, in late 1992, Local 63 conducted an election of its officers as well. These two election campaigns directly relate to the bulletin board and distribution issues described above, for a dispute arose over whether employees were permitted to post or distribute union-related materials on the employee bulletin board located at the dispatch/break room in each of the two distribution centers.

In addition, Respondent's purchase of the Safeway division resulted in merging groups of employees together which had experienced different company cultures. To deal with that, Respondent utilized a communications system which was already in place, the ''Round Table,'' to discuss with the drivers those changes in practices and cultures which resulted. One of the Round Table meetings will be scrutinized here as the General Counsel has alleged that Respondent improperly polled individuals at one of the meetings and directly dealt with them, thereby bypassing the Union for that purpose.

Finally, the Round Table system generated the idea for the QCG which is under attack here. The QCG is an action empowered offshoot of the Round Table, for the Round Table itself has no operational authority.

During this period of time the transportation manager for Santa Fe Springs and El Monte was Darwyn Jones. He reported to Transportation Vice President Dick Maron. Subordinate to Jones were driver supervisors who included John Ford, Mike Rosenau, and Shari Smith. It is fair to say however that Jones accepts all responsibility for what is under scrutiny here.

The other individuals involved in this matter are the members of the QCG and the individuals who oppose its existence. The QCG consists of roughly seven truckdrivers, Jones,

[2] The chains are: Vons, Pavilions, Tiangus, and Williams Bros.

[3] The Food Employers Council and at least six Teamsters locals.

and occasionally, other management personnel. The driver principally responsible for the idea of the QCG is Wilbum (Wil) Lopez. Although Lopez has never been chairman of the group, he was one of its original members and still remains in the group. The actual chairman is another driver named Norvil Lantz. It also has a recording secretary who keeps the minutes. That duty has been rotated to various people, each of whom is also a driver.

The opponents of the QCG are Charging Party Moerler and Union President (formerly Business Agent) Bob Molina. Both Moerler and Campbell are activists within the Union. Moerler is involved with a reform movement known as the Teamsters for a Democratic Union, which had success in the International's election. Both Moerler and Campbell, insofar as Local 63 is concerned, are political opponents of Molina.

It is unnecessary to describe the various political points of view of the activists; neither is it required to go into great detail with respect to the formation of the QCG. With regard to the latter, the evidence is undisputed that after the Safeway purchase, the stores which had belonged to Safeway as well as others that belonged to Vons experienced delivery problems of various types. These appear to have arisen from lack of familiarity with the stores, the dovetailing seniority system, and the difference in, and reliability of the equipment which the drivers were obligated to use.

Those problems caused Lopez in late 1989 to write a detailed memo to Jones recommending the establishment of a ''Task Force.''[4] Lopez argued persuasively that such a group could resolve the continuous problems which all the drivers were experiencing. Sometime in January (either 1990 or 1991, depending on whose recollection one relies upon) a Round Table meeting was conducted.[5] Prior to that Round Table, Jones had told his Driver Supervisor John Ford ''to make [the task force] happen.'' At the Round Table Jones and Ford sought volunteers for the task force and several drivers did volunteer, including Lopez. Eventually, as will be described below it became more formalized and also began to attract the attention of individuals who believed it to be contrary to their interest, such as Moerler.

We now proceed to describe the factual circumstances of these issues.

B. *Bulletin Boards*

Both at the Santa Fe Springs and El Monte facilities, four types of bulletin boards are attached to the walls in the drivers dispatch area. Initially, there were three bulletin boards or, in the case of El Monte, one bulletin board was split into two sections. These were: the company bulletin board reserved for official notices and messages from management to employees; the union bulletin board, reserved for official messages from union officials to Respondent's employees;[6] and third, there was an employee bulletin board on which employees were allowed to post various types of documents. There is a dispute about exactly what has historically been permitted on the employees' board. Prior to February 1991 that board was unenclosed and usually accessible to anyone who wished to use it. Even so, it was not, as the General Counsel alleges, an ''all-purpose'' message board. Beginning 1990 and lasting until the International election was completed in January 1992, that board was also used by employees who wished to post intraunion political messages urging the election of one candidate or another. Before that, it had been usually used for employee advertising, notices, and social matters.

Jones asserts that at no time has Respondent ever voluntarily permitted the employee bulletin board to be used for union campaign purposes. Thus, when Moerler and others in 1990 began to use that bulletin board for partisan messages, Respondent interdicted it. That action resulted in Moerler and perhaps others, filing complaints with the court-created agency which was overseeing the International's election. That individual was known institutionally as the ''Independent Administrator.''[7] As a result of these complaints, a settlement agreement was reached in which, inter alia, Respondent agreed to allow partisan campaign material to be posted on that bulletin board. To avoid defacement and like abuse of the board, the settlement agreement required Respondent to enclose that board in glass and to lock it. The keys were given to an office employee who was instructed to permit individuals to post campaign material thereon. That agreement began on February 1, 1991, and was to last until the International's election was concluded. Moerler appealed that settlement agreement to the Independent Administrator but he approved it over Moerler's objection.

The employee bulletin board remained under the terms of the settlement agreement until January 1992, when the election was over. At that time it was unlocked, although it continued to be enclosed.

In June 1992, Moerler began posting various types of material on that board, often dealing with internal union matters. For example, on about June 7 or 8, he posted a notice advising drivers that some of them had voted against converting from a 5-day, 8-hour schedule to a 4-day, 10-hour schedule. That issue was being discussed at union meetings had become an item of interest. His notice was removed by Driver Supervisor Shari Smith at Jones' direction. He also sought to post an article published in the New Teamsters News which expressed opposition to the concept of Round Table meetings. That particular document was a photocopy of the article together with a handwritten comment which Moerler had made. He was eventually allowed to post it without his written comment. He also tried to post an ''open letter'' to Vons stockholders which was alleged to be from ''Vons' rank and file Teamster employees.'' That letter asserted that some drivers were being subjected to improper personnel practices, including an allegation that the collective-bargaining contract was being frequently violated and the Union was being forced to arbitrate when it should not be. Parenthetically, I should note that this document on its face does not appear to be an official position of the Union. It was unsigned and as such amounts to an anonymous letter,

[4] Although Lopez has been a driver for the past 16 years, he has experience on the retail side, having served a period as a store manager. He appears to be well educated and articulate.

[5] Respondent has utilized the Round Table meeting since at least 1983. It was in place when Jones was hired in 1986. They are called on a varying frequency. The 10 or 12 participants invited to attend each meeting are paid for the time they spend in the session. Nearly all drivers eventually are asked to participate.

[6] The union bulletin board is established by the collective-bargaining contract.

[7] Moerler testified that he filed some 40 objections with the Independent Administrator.

although Moerler readily acknowledges that he is its author. He says that he tried to distribute it to stockholders at the annual meeting. He also sought to post an article, together with his handwritten comments, about the dangers of quality circles as he perceives them.

By memo dated June 12, 1992, Jones advised that the employee bulletin board would be locked because persons were putting up ''negative notices.'' Thereafter, permission had to be sought from a supervisor before a posting.

In addition, in late 1992 both Moerler and Campbell attempted to either post or distribute material relating to the internal election of officers at Local 63. Moerler sought permission to post them on the bulletin board, but was denied; he also tried to distribute them; likewise, Campbell tried to distribute them in the drivers' room at El Monte by leaving them on tables. Jones and other managers promptly picked them up. In all cases the explanation was that the Company did not allow any campaign material to be posted or distributed on the property.

After the June 12 locking of the employee bulletin board, the rules were modified slightly on two occasions thereafter, the last being on December 28, 1992, in which Driver Supervisor Shari Smith stated that the drivers personal bulletin board was to be used for advertisements and personal messages regarding drivers who were ill or retired. In addition she placed a limit of 30 days for each posting. It nonetheless remained locked and subject to review as to contents.

The QCG was also given the fourth bulletin board. On occasion matters relating to the QCG were posted on other bulletin boards as well. For example, a reproduction of an article in the Detroit News, dated December 18, 1992, was placed on the Employer's bulletin board sometime in late 1992. It related to the NLRB's decision in *Electromation*.[8] The article described the Board's decision in that matter, noting that the case involved a situation where the quality circle group at that nonunion employer was found to be a dominated labor organization which inhibited the employees' right to organize their own union. A sentence which stated, ''The ruling is not expected to affect such committees at unionized plants.'' was marked with a yellow highlighter.

Similarly, Moerler testified that on one occasion the QCG's so-called ''mission statement,'' a two-page document (which is in evidence) was put on the employee bulletin board covering some other material which he had posted. That can be seen in General Counsel's Exhibit 16. It was after that incident when the QCG was given its own board.

C. *The Round Table of June 11, 1992*

Moerler testified that, during the course of the June 11, 1992 Round Table meeting, two incidents occurred to which he objected. The first dealt with an issue the Union was then attempting to resolve internally. It appears that the collective-bargaining contract contains a negotiated item dealing with the nature of the work schedule. The then current work schedule required drivers to work a regular shift of 8 hours per day for 5 days a week. The collective-bargaining contract contains language (art. 16(B)) which permits the employer and the individual union, by mutual agreement, to establish a straight time workweek of four 10-hour days and that the Employer ''may schedule [after obtaining the approval of a majority of the employees so scheduled] and/or continue a basic straight time workweek of four (4) ten (10) hour days for any regular full-time employees'' in accordance with certain conditions not relevant here.

At the time of this Round Table, the Union was indeed conducting a vote of its drivers to determine whether they were agreeable to switch to such a schedule. In fact, Moerler had posted a notice (G.C. Exh. 12) on June 7 or 8 announcing that at a drivers' craft meeting on June 7 those present had unanimously voted against the four 10's system, urging others to do likewise.

He testified that at the Round Table meeting on June 11 Jones polled each of the employees who were present regarding how they intended to vote when it was presented to the full membership. Moerler said he objected to this procedure, but Jones overruled him and asked for a showing of hands. Moerler's testimony is essentially unrebutted, although the minutes of the meeting do not reflect any polling. The only reference in the minutes to the four 10's shift matter shows that drivers asked the Company to post ''the economic numbers surrounding the four 10-hour days from the Company's perspective.'' Jones agreed to post the figures. The minutes also reflect that the drivers asked that in the event that this new shift system was agreed to whether bidding on ''the four-ten hours'' would increase. The minutes show that Jones and the drivers agreed that the issue should go back to the bargaining table, but Jones ''did not feel that all bids would ever go to the 4-10 hour day structure.''

Similarly, Moerler also described the discussion of an arbitration which was then underway involving Vons' absorption of some drivers in Santa Maria, California. Respondent had recently purchased a small chain of grocery stores in that city, which is located about 165 miles up the Coast Highway from downtown Los Angeles (about 180 miles from Santa Fe Springs). The drivers who had been employed by that chain were represented by another Teamsters local headquartered in Santa Maria. They were, of course, based in Santa Maria. When Respondent acquired that chain, it had to resolve the question of how to deal with the drivers employed there. It opted to employ them and to continue to recognize the union which represented them. That recognition resulted in an arbitration at Local 63's behest which at the time of the June 11, 1992 Round Table was still in progress.

Moerler testified, ''Jones . . . wanted to ask us questions about the arbitration and how we thought it was going. . . . I recall one question specifically, asking drivers how we thought our attorney was doing with the arbitration.'' Moerler says that he objected to the conversation because he thought it was a ''negotiable issue and no one from the Union was present.''

Again, Jones did not offer a contrary version and the minutes are inconclusive on the point. The minutes do state that a question was asked about whether a terminal was being built in Santa Maria and that company officials replied that one was and would be used to consolidate backhauls. They also reflect that some of the drivers were of the opinion that Vice President of Transportation Dick Maron never intended the Santa Maria work to go to Local 63 drivers and that Jones had replied that it was a company decision to offer the work to the people in the Santa Maria area first.

[8] 309 NLRB 990 (1992).

D. *The Quality Circle Group (QCG)*

There is really no dispute that the idea for the committee which later became known as the Quality Circle Group came from Wil Lopez. He was aware that the drivers were the only ones in the transportation department who regularly delivered to the stores, including the stores newly acquired from Safeway. For years, he had heard only lip service given to drivers regarding repairs, lighting, and assistance from store personnel in unloading, or more properly, failing to help unload, the vehicles. His recommendation to Jones was a ''Task Force'' of drivers which would actually have authority to make the corrections which they perceived were needed. Jones was aware that there were circumstances where the empowerment of employees to act, within parameters laid down by management, could lead to more efficient operations and to a betterment of morale within the fleet. He had studied a well-known managerial book on the subject, *In Search of Excellence* by author Tom Peterson. Jones believed that the book described a management technique which should be utilized. Accordingly, he directed Driver Supervisor John Ford ''to make it happen.'' This resulted in the volunteers who came from a Round Table.

There is really no dispute about the nature of the group. In general it serves as a problem identifying and solving committee. Its voting members are the drivers, who are free to direct the committee in any specific direction that they choose (although as will be seen in the months preceding September 1992, they strayed into two areas which seem to be the root of the present litigation). By design, the management members have no control over the direction the group chooses to go. However, the group, through its secretary, files written reports with Jones who in turn passes matters along to Vice President of Transportation Dick Maron (Maron has since left the Company and at the time of the hearing had not been replaced). Ideas for action come from various sources, the QCG members themselves, complaints raised at Round Table meetings, and occasionally, suggestions from nongroup members. The QCG's membership changes from time to time. It has the power to select its own membership. It normally numbers about eight drivers.

In a document entitled ''The Quality Circle Group in the 90s'' apparently issued in early 1992 and purportedly welcoming new members to the group, the QCG described its goals and listed some of its accomplishments. Specifically it stated it ''realizes there is a need to focus on ways to increase profits, and at the same time, provide a quality work environment free of hazardous conditions . . . . It is the goal of the QCG to promote the safety and security of fellow employees and promote our Company's image. We encourage everyone to engage as a group in an objective and effective forum to undertake challenges and solve problems.'' The document acknowledges that they work under the direction of Maron, Jones, and Driver Supervisor Rosenau. In that portion of the document listing accomplishments it stated the following:

> 1. Implementation of 30 new power jacks and the influence in purchasing new types of jacks.
> 2. Worked with store 427 in solving parking problems.
> 3. Surveyed 100 stores which included obtaining detailed measurements and photographs for [Construction Department Vice President] Russ Doyle's information.
> 4. Established a work rapport with Purchasing Management, Construction and Human Resources.
> 5. Instrumental in switching power jacks and charges where there were more than two jacks available per store.
> 6. Surveyed store 227 and made strong recommendations for the use of receiving dock.
> 7. Successfully launched a program in solving the problem of E.O.D. [end of dock] bouncing by installing a safety dock chain system.
> 8. Installed swing lamps in stores [which are] inclosed [sic] (ongoing).
> 9. Developing a light for open docks (ongoing).
> 10. Recommended the purchase of dock levelers (approved).
> 11. Recommended the need for dock foam seals for inclosed [sic] docks.

The document also described the QCG's next projects which were listed as:

> 1. Back room receiving bell.
> 2. Receiving policy 50/50 (dealing with store personnel assistance in unloading trailers).
> 3. Exterior lighting.
> 4. Purchasing 60 additional power jacks.
> 5. Spinoff storesscissor docklift, power jacks (motor truck type).

It appears that the QCG researched the appropriate types of lighting for various docks, even inquiring into the price of purchase and directly dealing with vendors. With respect to pallet jacks (sometimes known as come-alongs), the committee spent some time researching the appropriate type of jack and even convinced the purchasing department to invite a number of vendors to show off their equipment. It subsequently made a recommendation about which equipment to buy. It also surveyed the length of the various loading docks and ramps, leading to a recommendation regarding the best length of trailer for the Company to next purchase.

It was not until sometime in July 1992 that the QCG ever focused on matters dealing with items which would be considered mandatory bargaining subjects. Unknown to the management members, the QCG developed a proposal regarding the drivers' right to wear shorts while on duty. The proposal was put in writing and presented simultaneously to both the Union and upper management at a meeting on September 17, 1992. Similarly, the QCG put together a proposal regarding changing the discipline policy concerning driver accidents. Jones became aware of that proposal approximately 2 weeks before it was presented at the same September 17 meeting.

That meeting is somewhat of a watershed incident in this case. It had been called by the members of the QCG which had invited Bob Molina, as the union president, to attend and three union stewards, Tony DeLuna, Gab Bulger, and Jim Moreno. In addition they invited Dick Maron, Respondent's vice president of transportation, as well as two other individuals from the Company. Also present, of course, were Jones and Driver Supervisor Mike Rosenau.

Molina testified that when then the two proposals were given to him, he was initially quite pleased with them. He

liked the idea of a shorts policy as well as a little more lenient treatment for the drivers who had been involved in accidents. Indeed, the QCG members had recognized that both proposals were well within the ambit of collective bargaining and their idea was to simply throw both matters to the Union and management and to allow them to proceed as they saw fit.

That is what occurred. Both matters were subsequently put on the bargaining table at a labor-management committee meeting[9] and became the subject of negotiations thereafter. Ultimately the Union and management agreed to the shorts policy and it was implemented in early 1993. The modified accident discipline policy received a different fate. Respondent believed the policy to be too lenient and ultimately rejected it as a proposal. It has never been implemented and the old accident policy remains in effect.

Since the advent of the September 17, 1992 presentation of the shorts and accident discipline policy proposals, there is no evidence that the QCG has continued to address issues which might be considered within the bargaining arena.[10]

When Moerler learned of the proposals which had been made at the September 17 meeting, he wrote a lengthy letter on September 23 to Molina complaining about the concept. He had earlier filed an unfair labor practice charge regarding the bulletin board problems he was encountering and urged the Union to file unfair labor practices charges concerning the QCG. He argued strenuously that the team concept the QCG was following was detrimental to the Union and perceived both the Round Table meetings and Quality Circle Group as attempts to negotiate directly with the employees.

That letter triggered a change in the Union's policy. On December 3, 1992, Molina asked Vons to cease and desist from including bargaining unit personnel in the QCG, asserting that it had gone beyond the scope of its authority and had infringed on Local 63's rights. On December 22, Respondent's director of labor relations, John N. McCarthy, wrote Molina observing that the two had had some telephone conversations and ''[a]s a result of these conversations, the format of our Quality Circle meetings has changed and, specifically, to the fact that we have a shop steward attending . . . . [a]s we have explained to you before, your union is the bargaining agent for the vast majority of our drivers. Our Quality Circle Groups will not infringe on any of your rights and responsibilities as a bargaining agent.''

The Union was unmoved and on January 4 so notified McCarthy. On March 1, the Union directed its Vons members to no longer participate in Round Table discussions, observing further that its earlier request that drivers discontinue participating in the QCG had not been well received and, accordingly, advised that in order to ensure that the QCG did not infringe on the Union's exclusive collective-bargaining rights, a union steward was being sent to attend those meetings. Since that time a union steward has participated in an ex-officio membership capacity at the QCG meetings.

Returning to the support Respondent gives the QCG, it is fair to say that the QCG meets approximately every 3 weeks or so and that its agendas are prescheduled by either Wil Lopez or the recording secretary who, most recently, was Dale Cram. Both Lopez and Cram do receive a certain amount of clerical support from Respondent on a ''scrounge-for basis.'' Whenever they need to have something typed, they seek the assistance of an office clerical who will type their handwritten documents. When the document is a report which is to be transmitted up the corporate hierarchy, Jones often proofreads the document and makes grammatical corrections. He says he does not make any substantive changes. In addition, the QCG has access to company copy machines and its print shop. And, of course, the company has created the QCG bulletin board which is posted at each of the distribution centers. All QCG members are paid the contract rate for the time they spend on QCG business.

E. *The Alleged Death Threat*

Moerler and Lopez, as we have already seen, are on different sides of the fence with respect to the QCG. While it may not be apparent from the first portion of this decision, Moerler's views about the Quality Circle Group and his opposition to it are both unyielding and fierce. He regards his fellow employees' acceptance of such concepts to be an anathema to the union movement. Sometime in November 1992, apparently after he wrote his letter to the Union complaining about the Quality Circle Group (and after a debate with Lopez at a union meeting) Moerler issued a flyer in which, among other things, he accused Wil Lopez of being a ''Quality Circle Jerk.'' The flyer, laden with sarcasm, accused Lopez and another member of the group of being disloyal to their fellow employees. In his last remark, preceding a cartoon, he said, ''You should be all thankful to have these two dedicated supervisors [the word ''supervisor'' is overstricken with a large X] union members working in our best interest. Remember to thank them the next time you see them—unless you get laid off.''

The cartoon which Moerler had modified, originally appeared in another publication. It shows a guillotine labeled ''manpower savings'' about to chop an employee's head into a bowl labeled ''jobs.'' The executioner turns to a man wearing a union hat saying, ''Believe it or not, but Wil Lopez and Mark Francis turned this suggestion in.'' Obviously Moerler's modification was the substitution of two QCG members' names for whatever appeared in the original cartoon.[11]

In the space of a couple of inches, and in both an unforgiving and graphic manner, including a sexual innuendo, the ''circle jerk'' reference, Moerler has accused Lopez of being secret supervisor and the source of future layoffs.

Moerler distributed the cartoon in the drivers' room in Santa Fe Springs. It may have been distributed elsewhere as well. It is clearly a document which would not have passed

[9] The labor-management committee is a standing committee created by the collective-bargaining contract and is designed to deal with ongoing issues of concern to either the unions or to the various employers bound to the contract.

[10] There is a document in evidence in which someone from the QCG proposed that an existing driver/mechanic incentive program for the reduction of on the job injuries and absenteeism be modified to allow for the award to be in company stock certificates, rather than gift certificates. The document was produced pursuant to a subpoena but no one who testified was familiar with it. It is undated and it is unclear when it was drafted. Moreover, it seems clear that the proposal went no further. It appears to be a dead letter.

[11] The memo and the cartoon are attached as App. ''A'' [omitted from publication].

bulletin board muster under Respondent's then-current bulletin board rules.

There are two different but, substantially similar, descriptions of the predictable confrontation which ensued between Moerler and Lopez. Aside from the fact that Lopez says that he did not see the flyer until the confrontation began (he had heard about it), it is apparent to me that under either version Moerler was serving as a provocateur. That is apparent even using Moerler's version of the facts. According to Moerler, he was distributing the flyers on tables in the drivers' room. Jones observed him and asked if he was the one who was distributing them. Moerler replied by asking if Jones was the one who was crumpling them up. Jones then asked Moerler to remain in the room for a few moments and left. Within minutes, accordingly to Moerler, Lopez came from Jones' office[12] and also asked Moerler if he was the one distributing the flyers. Moerler testified, ''There was a little bit of discussion about the Quality Circle Group. Wil was very upset at me obviously, my position on the group. He told me that when all of this stuff was over, referring to the Quality Circle Group, and my grievance and opposition to it, that I would have to deal with him later, away from Vons.'' He says that a driver then interrupted them[13] by making a remark which further upset Lopez. Lopez stood up from where he had been sitting and walked over to the table where Moerler was sitting and said, ''You better worry about your life.'' Moerler says Lopez then went into the locker room. When he came out a little later, Moerler asked Lopez what he meant by that. He says Lopez again walked over, saying, ''You just might get run over by a truck or something.''[14]

I note that even though Moerler later reported the incident to his supervisor and then to the company security department, he never mentioned Lopez by name. Furthermore, when they asked him for the names of witnesses, he said he had a list of witnesses from whom he had taken statements. On cross-examination he was unable to say who those witnesses were. He claims he did not give Lopez' name to the security department because he was afraid Lopez would bring internal union charges against him.

Frankly, I am unimpressed with Moerler's behavior. This is a classic case of a provocateur seeking advantage from his own misconduct. The flyer was clearly intended to provoke a confrontation. Moerler knew it when he wrote it and can hardly be said to be surprised when he got the results he expected. When he says he asked what Lopez ''meant by that,'' I accept Lopez' testimony that in fact the words Moerler used were, ''Are you threatening me?''—a belligerent challenge. In that circumstance, it is clear to me that Moerler was hoping Lopez would respond at least as he did, if not actually more hostile. I believe Moerler is so wed to his opposition to Quality Circle Group, he is willing to become a martyr for it. However, Lopez only nibbled at the bait and did not actually engage in any violence. Instead, after the hot words, he walked away.

Moerler's odd behavior, it seems to me, justifies the conclusion that his version is designed to prevent an inquiry from learning the actual truth. He believes that if he discredits Lopez, he discredits the QCG. He is willing to accomplish that result by the cartoon attack and by provoking Lopez into a confrontation which Moerler can escalate to his advantage, yet at the same time blocking any inquiry into the incident which might reach a conclusion different from the one he espouses.

The complaint asserts that Lopez is Respondent's agent and is responsible for his supposed threat to Moerler. I think it is clear that Lopez did make remarks similar to those alleged in the complaint. It is also clear, as I have found in the previous paragraphs, that he would not have done so had Moerler not designed the situation as a provocation.

The General Counsel's theory with respect to Respondent's culpability is that Lopez is a member of the QCG, a dominated labor organization, and therefore he must be Respondent's agent. Assuming, for the purposes of discussion, that the QCG is a dominated labor organization, it does not follow that its members are agents of Respondent for the purpose of culpability in a situation such as this. To make that finding, I would have to also find that Respondent had authorized Lopez to exceed the bounds of civil behavior with an eye toward coercing Moerler from engaging in Section 7 activity. There is, simply put, no such evidence.

Moreover, it is quite clear that Moerler, in confronting Lopez as he did, was not engaging in any activity protected by Section 7. Accordingly, whatever Lopez did in response, it was a personal act, not something which was company authorized. Since Moerler had approached the entire matter with a chip on his shoulder, daring Lopez to knock it off, all Lopez really did was to defend himself verbally and to extricate himself from a potentially volatile situation, one which he did not initiate.

IV. ANALYSIS AND CONCLUSIONS

A. *The Bulletin Board and the Distribution Issues*

Both the bulletin board issue and the distribution prohibitions raise questions of the right to publish and disseminate information which employees wish to broadcast to their fellows. Under the Act, however, each is treated quite differently. Indeed, there is some question regarding the clarity of Board law when it comes to bulletin boards, protected concerted activity, and the concerted nature of flyers issued by candidates for union office. Each issue will be discussed separately.

It must be understood first that an employer exists for a specific purpose, usually entrepreneurial. It owns or has exclusive control over the business property or premises and is, within limits, entitled to insist on an atmosphere conducive to producing the product or service which it is in the business to generate. No law, and certainly not the Act, obligates an employer to provide on that property a permanent forum to debate workplace issues. *Container Corp. of America*, 244

[12] An assertion I do not accept due to Lopez' more credible version.

[13] Apparently there were several drivers in the room. None testified; see Moerler's explanation, infra.

[14] Lopez does not deny using the words but does put them differently, asserting among other things that Moerler first approached him in the restroom connected to the locker room. Upon leaving the restroom, they had a discussion about the QCG which became somewhat heated and that he had told Moerler, ''After all this was said and done you and I . . . everyone of us has to dance to a different tune.'' Lopez says Moerler asked if that was a threat and Lopez said, ''Anything could happen . . . that they could walk out of the room and get hit by a truck.'' He says he did not see the flyers until somewhat later.

NLRB 318 (1979), enfd. in pertinent part 649 F.2d 1213 (6th Cir. 1981); *Honeywell, Inc*., 262 NLRB 1402 (1982); *Raytheon Corp*., 277 NLRB 1528 (1986); also *Union Carbide Corp. v. NLRB*, 714 F.2d 657 (6th Cir. 1983); *NLRB v. Southwire Co*., 801 F.2d 1252 (11th Cir. 1986).

Despite that broad statement of an employer's right, in practice those employers who have provided bulletin boards to employees for their personal use have generally found that once they have permitted employees the right to use those boards for personal reasons, a subsequent restriction on union-related messages is usually regarded as discriminatory and violative of Section 8(a)(1) of the Act as a restraint on union and/or protected concerted activity. *Honeywell, Inc*., supra, *Union Carbide Corp. v. NLRB*, supra, and many others. By the same token, an employer does not have to permit any ad hoc forum which arises in those circumstances to become a ''battleground.'' *Nugent Service*, 207 NLRB 158 (1973); *Contra Costa Times*, 228 NLRB 692 (1977); *Union Carbide Corp. v. NLRB*, supra.

Furthermore, the Board must take into account the nature of both the message and the proposed restriction. It has long been held that the Section 7 right to organize, decertify or substitute a bargaining representative is entitled to paramount protection. Moreover, activity designed to publicize disputes within the workplace over working conditions, including the effectiveness of the bargaining agent, is worthy of protection. Usually that activity finds protection under the aegis of the ''mutual aid and protection'' clause of Section 7. See *Firestone Steel Products*, 244 NLRB 826 (1979) (purely political tracts; state office seekers; not protected) and *Trover Clinic*, 280 NLRB 6 (1986) (cartoon with message related to employer's treatment of employees; protected). Clearly the straightforward act of running for elective union office does not fall easily within that rubric it is not simply a question of ''mutual aid or protection,'' it is something less. Even so, it does not fall to the level of a pure political tract like that seen in *Firestone*, supra. It is something which is ''in between.'' It certainly is a union activity, but not, in the direct sense, one which is aimed at ''mutual aid and protection.'' That issue would not directly arise until the elected officer began applying himself/herself to an actual workplace issue. The act of running for office is therefore not closely connected to any workplace issue. To be sure, candidates will raise workplace matters as campaign issues as arguments for their election; even at that stage, however, it is generally remote from an employer's concern.

The employer's concern, in internal union elections, is usually limited to the perception that the election is none of its business and foreign to its entrepreneurial aims. It is an irrelevancy which is a distraction to the performance of work. Furthermore, employers do not usually wish to be perceived as favoring one candidate or another. For that reason they do not wish to provide a forum to any candidate.

Similarly, even where a workplace issue becomes a common concern to employees, an employer may not wish to encourage greater dissent from persons who disagree from the employer's resolution or proposed resolution of a particular issue even where it knows it cannot entirely prevent that disagreement from being discussed. It may simply wish to keep such matters off its bulletin boards, even though it also knows that the disagreement may be orally discussed or reduced to written form and legally distributed in nonwork areas during nonwork times.

Bulletin Boards—Clearly a bulletin board may become a permanent forum for the expression of ideas, including dissent. Messages posted on it have more permanency than do flyers which are often discarded. Indeed, that very permanence is the inducement of unions to negotiate the right to have their own bulletin boards so its messages to its members will be seen clearly and be clearly understood. In this very case the Union has done exactly that. It has negotiated the right to have its own bulletin boards placed in the areas where its constituents may readily see its communiqus. That right appears in article 14A of the collective-bargaining agreement and reads as follows:

> The employer shall provide a bulletin board which shall be used exclusively for authorized Union notices, but same shall not be posted until they have first been called to the attention of the Employer. All such Union notices shall be authorized and signed by [an appropriate union official].

As can be seen, the clause does not give the Union the absolute right to use the bulletin board in any way it sees fit. Respondent has maintained some control over what the Union actually wishes to post. The full extent of those controls have not been clearly defined. Even so, the Board has long analyzed such clauses by observing that they are not the union's waiver of any right to which the union may be entitled. Instead, these are concessions which the union has extracted from the employer, a recognition that there is no right to have bulletin boards in the first place. See *Armco Steel Corp*., 148 NLRB 1179, 1186 (1964); *Universal Life Insurance Co*., 169 NLRB 1118 (1968); *Eastex, Inc*., 215 NLRB 271, 272 (1974); *Special Machine & Engineering*, 247 NLRB 884 (1980).

The nature of the extraction is such that it recognizes the right of the employer to maintain limits on the use of the bulletin board. It is a recognition that even official union postings are subject to the employer's oversight, i.e., the bulletin board is not intended to become a forum for the discussion of workplace issues, but is instead for ''official'' union business, presumably announcements, minutes, reports, and the like.

If the Union's extraction itself is subject to such oversight, it seems most unlikely, indeed, anomalous, that the employee bulletin board would have even greater broadcast authority. Respondent, of course, maintains that its authorization to employees is even less; that the employee board is limited to matters such as personal want-ads, social announcements, and personal news items about drivers.

The evidence does not clearly show that Respondent has ever knowingly or willingly allowed the employee bulletin board to be used for purposes beyond those which it has prescribed. Thus, until the Department of Justice overseen International election it had never been used for any union-related matter. Indeed, until Moerler began using it for what he perceives as his union-related messages, there is no showing that anyone had attempted to use it as a forum for commentary on employment-related matters. It should be kept in mind that the employee bulletin board was first enclosed in glass and locked in early 1991 as part of the settlement

agreement between it and the Department of Justice. Prior to that time it had been open. Even so, the evidence presented to me is scanty with respect to what had been posted on it besides personal want-ads, social announcements, and personal news items about drivers. I think there is the distinct possibility that other types of material had been posted, but that is not proof that they were. Moerler's testimony is vague and not very descriptive of postings beyond what Respondent normally permitted. Moreover, there is no showing that Respondent knowingly allowed other items to be posted. They may well have been in breach of the policy, but do not constitute any sort of precedent. See *Miller Brewing Co*., 311 NLRB 1364 (1993). Certainly the locking of the Board and the concomitant postings of the candidates for International union office do not constitute a precedent either, for that was done under compulsion of law. It was a temporary measure. When that obligation expired, and the board was unlocked, Moerler began taking advantage of that to make his postings. It took a while for Respondent to realize that he was seeking to use the board in violation of its policies, but when it came to that realization, it began enforcing the rules and clarifying them in accordance with its wish to prevent the board from becoming a workplace forum. I do not think Moerler's initial success in posting those matters became a precedent either. He simply got away with breaking the policy for a few weeks.

It is true that when Respondent relocked the board in June 1992 it cited ''negative'' postings as its reason. Clearly Moerler's postings did qualify as ''negative'' for he was debating the efficacy of the Round Table and the Quality Circle Group. Both of these are management devices which Respondent viewed as contributing to a successful, productive environment. I do not disagree with Moerler that he has the right to place both items into the public debate mill. I do think, however, that Respondent is well with its right to view an employee-sponsored opposition to its policies as ''negative,'' at least in the sense that it tends to undermine those practices and might lead to problems. In that circumstance it is not obligated to give Moerler or any employee, not even the Union, a permanent jobsite forum from which those views may be espoused. The employee bulletin board, if so used, was in danger of becoming such a forum. Moerler made that quite clear when he attempted to post his anonymous ''open letter'' to stockholders on that same board after it was again locked. He did it again later when he attempted to post literature in favor of certain candidates for Local 63 office.

With respect to the candidates' literature, the Board has decided two principal cases: *Nugent Service*, supra, and *Arkansas-Best Freight System*, 257 NLRB 420, 423–424 (1981), enfd. per curiam sub nom. *ABF Freight System v. NLRB*, 673 F.2d 228 (8th Cir. 1992). In the first case, *Nugent*, the Board adopted Administrative Law Judge Milton Janus' decision. It was a case, somewhat similar to this, in which the recognized union had its own bulletin board. There was also a company board. Employees had free access to both boards and they were used by employees for personal matters without prior approval. A group of employees opposing the incumbent union officers began using both boards in favor of the opposition candidates. The material was removed by the incumbents; the opponents promptly reposted them. Arguments ensued, thereby rendering the bulletin boards an area of contention. The company stepped in and stopped the postings, saying it didn't want anything on the bulletin boards which might cause friction or trouble on the dock.

Judge Janus, in finding no violation, either as to the interdiction of the postings or the discipline levied on the employee who refused to comply, said the company could prevent the boards from becoming a battleground. He explained:

> To hold, as the General Counsel seems to contend, that Vellani and his group had an absolute right to use the bulletin boards in their campaign for union office would, in my opinion, be unduly prejudicial to the Company's property and management rights. Use of the bulletin boards to carry on a partisan union campaign is not essential to publicizing the position . . . of the rival groups, since each had the right to solicit employees and distribute its literature at appropriate times and places. The boards then are only one of the means of communication between candidates for union office and their constituency. But since the boards are also a medium of communication between an employer and [its] employees (like a company publication) their use for partisan union purposes serves to entangle the Employer in a dispute which should be none of his concern, and which could force him to intervene in allocating the amount of space available and the length of time each side could have for posting its literature. I think it is more conducive to employees' rights to require an employer to keep hands off all aspects of a union election than it would be for him to intervene, no matter how even handedly he might attempt it.
>
> Based on the foregoing, I conclude that Vellani did not have a right protected by Section 7 of the Act to post his partisan campaign literature on the bulletin boards. [207 NLRB at 161.]

Similarly, *Arkansas-Best Freight System* has facts which are quite close to those present here. Again, a group of candidates for union office began posting partisan campaign literature. The employer there had three bulletin boards; the first two were a company board and a union board established by the collective-bargaining process. Both were locked and under glass. The third was also a company board but was open. Employees did not use them at all. Employees who wished to make social or personal announcements taped their notices to the walls in the drivers' room. Three years previously, partisan campaign messages had also been posted on the walls without interference by the company. A recently transferred manager later stopped the practice. He created an open employee bulletin board which he limited by rule to ''notices of sales of personal property and other items.'' He then transferred all notices meeting that description to that board. He refused, however, to transfer the partisan union messages to it. Instead, the company promulgated a rule which observed that elections for union office were upcoming, that the company had a policy of neutrality on union politics, and that the distribution/posting of campaign literature was prohibited. It further directed that the bulletin boards and walls be swept of such material on a daily basis. It also directed supervisory personnel to refrain from partial-

ity toward or against candidates, but allowed employees to wear buttons or clothing containing campaign slogans.

Administrative Law Judge Marvin Roth, affirmed by the Board, found the rule and the prohibition to violate Section 8(a)(1) of the Act. He distinguished *Nugent* on what he regarded as factual grounds, specifically noting that the bulletin boards there had become an area of confrontation and that Judge Janus was applying a rule of reason dealing with the existence of evidence that a special circumstance, the fear of confrontation, justified the dismissal of the complaint. Judge Roth also said that the primary purpose of the bulletin boards there was for the company and the union to communicate with employees and the Nugent employees were usurping them. He said in his case, *Arkansas-Best*, that the employees were only using the board which they had been given the right to use. He then went on to find no special circumstances such as the threat of confrontation to justify the employer's denial of the employee bulletin board to the political candidates. In that regard, he cited the Supreme Court's *Republic Aviation* case.[15] Finally, he did not discuss the fact that an employer has the right to impose limits on bulletin boards it has no obligation to provide in the first place.

It is true that *Arkansas Best Freight System* and other bulletin board cases utilize the *Republic Aviation* phraseology, 324 U.S. at 801, that unusual conditions or special circumstances are necessary before an employer can entirely bar certain information dissemination. That case, of course, did not actually deal with bulletin boards. It dealt with total bans on the distribution of literature and bans on wearing union pins or buttons in an initial union organizing context. Neither *Republic* nor the bulletin board cases which later rely on it discuss permanent forums in any way. Nor do they discuss the fact that no employer is obligated to have employee bulletin boards at all, a right which derives from the employer's property interest and management interest. It seems clear to me that the special circumstances analysis is appropriate only when the right to communicate emanates solely from rights under the Act such as the distribution of literature and the wearing of pins and apparel containing messages. When the right is restricted ab initio, such as arising from an employer concession regarding its property rights, the special circumstances of *Republic* are logically inapplicable. In that situation, discrimination in application becomes the issue for the Act, not the unfettered right to speak as in distribution or button/apparel cases.

Although Judge Roth and the Board appear to have factually distinguished *Arkansas-Best Freight System* from *Nugent*, I am not persuaded that there is a great deal of difference. The ''battleground'' distinction is a neat one, but not really legitimate. *Nugent* did not actually involve violence, only arguments. That is the same concern which the employer in *Arkansas-Best* perceived. All public and private debate have the potential for fierce argument and even violence. In both *Nugent and Arkansas-Best*, the employers were trying to defuse arguments before they became too heated and disrupted the civility which production requires. Moreover, the Board never discussed in *Arkansas Best* the property and management rights concerns. Even so, in *Miller Brewing*, supra, the Board recently focused only on whether the posting ban was discriminatorily motivated, continuing to recognize, at least implicitly, that bulletin board and posting rules emanate from property and management rights, not the Act.

I have therefore come to the reluctant conclusion that there are two unreconciled lines of Board cases dealing with an employer's right to control postings on its premises. Furthermore, there are two unreconciled sublines of cases dealing with an employer's right to deal with postings related to the election of candidates to union office. They are exemplified by *Nugent* and *Arkansas-Best*.

Therefore, I shall decide the bulletin Board issues based on my understanding of the appropriate analysis. It is basic, I think, to start with the fact that bulletin boards are attached to the employer's property and that there is no right for employees to have them in the first place. Indeed, in its brief to me the General Counsel concedes as much. Therefore, absent a showing that the rules which Respondent follows with respect to the use of the employee bulletin boards are applied disparately, favoring one group of employees over another, or favoring one philosophy over another, they cannot be deemed to be an impediment to the exercise of Section 7 rights by employees. *Container Corp.*, 244 NLRB 318 fn. 2 (1979), and cases cited therein. Here, so far as the record shows, Respondent has always limited the employee bulletin board to want-ads, social matters, and news about drivers. It has never willingly or voluntarily permitted that bulletin board to be used as a public forum. Enforcing that limitation is well within its property right and management authority. Accordingly, I conclude that its rules do not infringe upon the Section 7 rights of the employees. This is true whether the documents sought to be posted were union candidates' campaign material or were tracts designed as commentary on working conditions. With respect to the former, I believe *Nugent* provides the better logic; with respect to the latter, I believe *Miller Brewing* seems the most appropriate. One should keep in mind, too, that Respondent has not disciplined any employee for abusing the posting limitations. All it has done is control the board.

Distribution—A different result may obtain with respect to the distribution of union-related material. Respondent, however, has only been accused in this complaint of barring the distribution of union office-seeker campaign material. It has not been accused of prohibiting the distribution of material which it might regard as ''negative,'' such as criticism of the QCG or the Round Table. Indeed, the only other document which seems to have been distributed is Moerler's cartoon attack on Lopez, which will be discussed in another section of this decision. Even so, Respondent did not bar its distribution.

Thus, I am faced with the question of whether or not Respondent may, on an ad hoc basis (since Respondent has cited no plant rule governing the issue) entirely bar from its premises, at all times and places, literature in support of candidates for union office. Here I must find in favor of the General Counsel. It is true that an argument can be constructed which would support Respondent, i.e., that running for office is protected by the Labor-Management Reporting and Disclosure Act of 1959, not Section 7 of the National Labor Relations Act. After all, the ''mutual aid and protection'' clause is not directly involved. However, it seems to me that the Board has clearly answered that concern in *Ar-*

[15] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 fn. 10 (1945).

kansas-Best Freight System, supra. In that case the employer, in addition to its bulletin board ban, also entirely banned the circulation and distribution of such literature from its premises, exactly what Respondent has done here. The Board, relying on *Republic Aviation*, supra, found that the employer could not promulgate or maintain a rule which prohibits employees from distributing union officer election campaign material on nonworking time or in nonworking areas. 257 NLRB 420 at 424. Accordingly, I find Respondent's policy barring the distribution of such material at times and places where such distributions will not interfere with work to be a violation of Section 8(a)(1) of the Act.

B. *The Alleged Unilateral Change*

The General Counsel argues that Respondent's supposed changing the rules of usage with respect to the employee bulletin board violates the duty to bargain under Section 8(a)(5) and (1) as an unlawful unilateral change. Under the General Counsel's view that occurred three times beginning in June and ending on December 28, Respondent argues that these changes are minor and insignificant; the General Counsel argues to the contrary. However, I am not persuaded that Respondent had any duty to bargain over the rules pertaining to the employee bulletin board in the first place. The rule against unilateral changes derives straight from Section 8(d) which requires parties to a collective-bargaining relationship to bargain in good faith over subjects deemed to be mandatory subjects of bargaining. In the words of that statute, such subjects are ''wages, hours and other terms and conditions of employment.'' An employee bulletin board which no law commands an employer to establish cannot, by definition, be a mandatory subject of bargaining. Use of that board is not, moreover, a term or condition of employment. It is simply a convenience which the employer provides to its employees who wish to post messages such as want-ads, social matters, or personal news items. Even if the employer permitted messages beyond those which this employer allows, such as newspaper items, editorials and the like, I fail to see how that would come under the ambit of Section 8(a)(5). A change might become discriminatory under Section 8(a)(1), but would not impact the bargaining obligation.

Peerless Food Products, 236 NLRB 161 (1978), relied on by the General Counsel, is not to the contrary. That case simply dealt with an employer who interfered with the grievance process by changing its practice regarding allowing the union access to its production areas. Grievance processing is closely connected to collective bargaining and is itself a mandatory subject. The case certainly does not hold that nonmandatory bargaining subjects are transformed to mandatory subjects simply by usage. Topics are either mandatory or not; they are not transformed from one to another by action of parties. That question is one of legal definition, nothing else. *Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 176 (1971). Accordingly, the allegation that Respondent's rule modifications violate Section 8(a)(5) as a unilateral change must be dismissed. I should point out, too, that even if the rules were a mandatory bargaining subject, the changes made here are neither material or substantial. See *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976). Indeed, the General Counsel has not firmly established that there was any change in the rule beginning with the June announcement. That may well have been only the republication of the preexisting rule. To show a change, there must be an ending point different from the starting point. Moerler's testimony does not accomplish that.

C. *The Round Tables Bypassing the Union*

At the Round Table in question, June 11, 1992, according to Moerler, Respondent engaged in two types of activities. First, Jones supposedly asked the assembled group how they thought their lawyer was doing in the arbitration then underway over whether Respondent had properly excluded the Santa Maria drivers from Local 63's bargaining unit. Moerler's testimony stands unopposed by the oral testimony of anyone, but the minutes of the meeting are in evidence. If one compares the two, it is apparent that although the Santa Maria situation came up in an employee question the query had not so much to do with any arbitration, but why the Company had chosen to recognize the Santa Maria Teamsters local over Local 63. Assuming that topic was the principal context of the discussion, Moerler's recollection of the question which Jones supposedly asked is most truncated and seems to be in the context of what amounted to a public discussion of a public matter. That issue had already been taken up by Local 63 and any question which Jones may have asked with respect to how the employees thought their lawyer was doing in this case seems to be more in the nature of informal conversation than anything else. It certainly would not have the effect of coercing anyone from engaging in activity on behalf of Local 63 or any other labor union, if an independent violation of Section 8(a)(1) had been alleged. See *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), for a discussion of that requirement. Moreover, I fail to see how that particular discussion would constitute an effort to bypass the Union. Most likely it was simply an innocent query about a matter of general interest. The minutes' reflection that Jones' response that the decision to recognize the Santa Maria local was a company one, is certainly consistent with the purpose of Round Table meetings, to inform the drivers what was going on. He might have been more descriptive, but it is unlikely that he has any knowledge of the law relating to accretions. In this context, I fail to see how this discussion was in any way unlawful.

The next item which Moerler recalls is Jones polling those present with respect to their views on whether the weekly schedules would be switched from five 8-hour shifts to four 10-hour shifts. If this were a matter of actual negotiations, I think the General Counsel's recitation of *Obie Pacific*, 196 NLRB 458 (1972), and its progeny would be appropriate. However, this matter appears to have been entirely in the hands of the employees. Collective bargaining was over. The contract specifically permitted the employees to choose a four 10-hour shift on a majority vote. The matter was, by contact, out of Respondent's hands.

Per the contract, that subject matter had been brought up at a union meeting as well as, according to Moerler, a so-called craft meeting of drivers (which appears to have been attended only by a few). That group had already voted against it. The vote was scheduled to continue at the union hall over the next few days.

It is quite apparent that under the collective-bargaining contract Respondent did not care one way or another which shift the drivers chose. Under either version it would be operating under a system authorized by the collective-bargain-

ing contract. Assuming Jones in fact conducted the poll as Moerler says, asking for a show of hands about how they intended to vote, at worst all Jones would have been doing was to try to determine whether or not it was likely he would have to prepare schedules under the new system. However, neither he nor anyone in management, had the authority or power to influence what was to happen. It was not until the entire bargaining unit voted on the matter, by the approximately 400 drivers at Santa Fe Springs and El Monte, plus at least one other location, that the ultimate answer would be known. Since there were only 10 or 12 individuals who attended this particular Round Table meeting, Jones' supposed poll would not have influenced the entire group in any way. Moreover, it did not even influence the 12 who were there and if it did, as previously observed, it did not constitute direct dealing. Such direct dealing, if it can be called that, had long since been immunized at the collective-bargaining table when the contract permitting the employees to choose was concluded. Accordingly, I fail to see that this poll violated Section 8(a)(5) and (1) of the Act as an incident of direct dealing or bypassing the Union.[16] See *East Tennessee Baptist Hospital*, 304 NLRB 872, 873 (1991).

D. *The Quality Circle Group Labor Organization*

The complaint alleges that Respondent has violated Section 8(a)(2) and (5) of the Act by creating and dominating a labor organization and dealing with it in the face of the exclusive representational rights of Local 63. I find, however, that this Quality Circle Group did not constitute a labor organization, but was instead a management tool designed to permit rank-and-file employees to assist management in making its operations more efficient.

Section 8(a)(5) of the Act prohibits employers from bypassing or directly dealing with employees in circumstances which derogate the status of a union having exclusive representational status under Section 9(a).[17] In addition, Section 8(a)(2) declares it to be an unfair labor practice where an employer ''dominate[s] or interfere[s] with the formation or administration of any labor organization or contribute[s] financial or other support to it [proviso not applicable here].'' Furthermore, Section 2(5) clearly defines the phrase ''labor organization.'' It states:

> The term ''labor organization'' means any organization of any kind, or any agency or employee *representation* committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of *dealing with* employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. [Emphasis added.]

Analytically, one must begin with whether the QCG is a labor organization, and if so, whether it is ''dominated'' by the Employer. The latter question is easy to answer, so I address it first.

I think it is quite true that the QCG was and is ''dominated'' by Respondent. Respondent certainly authorized its creation, provided it with a small budget, gave it the authority to coordinate its operation between and among departments, paid the employees for their time in performing those duties, and supplied it with clerical support.

Yet, until the late summer of 1992, it did not concern itself with anything which even approached constituting a mandatory bargaining subject as defined by Section 8(d). Indeed, it is questionable that it even dealt with subjects which the Union might be interested in but which were nonmandatory bargaining subjects. Certainly until that time it did not concern itself with the Section 2(5) characteristics, grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. It focused instead on operational matters. The list of accomplishments makes that quite clear. These items ranged from the purchase of power jacks, developing the safety chain locks system at the docks, improving dock lighting, resolving a parking problem caused by theater patrons who encroached on a store's dock area, adding ladders to deep docks, and surveying stores to determine the appropriate length of the new trailers which were to be purchased. Some of these inquiries dealt with safety matters but not safety rules or areas which the Union might wish to negotiate about. Safety issues were dealt with by recommendations dealing with the acquisition or installation of equipment deemed by employees to make their jobs a bit easier or safer. In essence, the QCG was recommending operational and capital improvements for the Company. None of these is a ''representational'' matter.

It was not until it became involved in the shorts and the driver accident policy that the QCG began to encroach on Section 2(5) and 8(d) matters.[18] Even so, despite the Union's current concern about the intrusion of the QCG into areas traditionally reserved to it, since the Union co-opted those two items in the manner it did, it can no longer be heard to complain. When these two subjects were turned over to the Union for action at the September 12, 1992 meeting, the Union took it upon itself to present them to the Company at the labor-management committee meetings. Indeed, the Union successfully negotiated a change in the Company's policy regarding the wearing of shorts. That change was subsequently incorporated into a company manual. Likewise, the Union found the proposed change in the accident policy to its liking and proposed those changes to the Company as well, also at the labor-management committee level. This proposal, however, was not successful in that Respondent would not accede to it.

The principal point, however, is that the Union, insofar as both of these two topics are concerned, has picked them up and run with them. By doing that it knowingly approved what the QCG had done. It has, therefore, intelligently waived any complaint about those two topics which might legitimately have had about the committee's activities. Therefore, those two subject matters are not proof that the QCG is currently engaging in any conduct intruding into traditional

[16] In this regard I think the Union did not yet know what it was going to be doing either, since it was awaiting the result of the election itself. Therefore, it was a matter of indifference to both Respondent and the Union as to how it came out. Either choice was acceptable.

[17] Sec. 8(a)(5) reads:

> It shall be an unfair labor practice for an employer—
> to refuse to bargain collectively with the representatives of his employees . . . .

[18] Sec. 8(d) lists the mandatory bargaining subjects: ''wages, hours and other terms and conditions of employment.'' These are the subjects which a 9(a) union and its employer must bargain about.

areas of union representation or that it is likely to do so in the future.

In fact, when the Union began having second thoughts about the QCG, it wrote a series of letters and demands to the Company which resulted in a promise from the Company that the QCG would not intrude into those areas in the future. There is no evidence that it has done so. Instead, the QCG has once again turned its attention to management-related functions. Indeed, the Union has, with the approval of the QCG and management, placed stewards at the QCG meetings who monitor the doings of the committee to be certain that the QCG does not go into areas which the Union disapproves. Accordingly, I find that the proof to be insufficient to warrant a finding that the purpose of the QCG is to meet and deal with management in any representational capacity as described in Section 2(5). It is simply a study group which first brainstorms about problems drivers encounter and then carries out remedies through decisions not related to the collective-bargaining relationship. It is solely involved in operational matters. It is therefore not a 2(5) labor organization. The fact that it is ''dominated'' is therefore irrelevant. Accordingly, both the 8(a)(2) and (5) portions of the complaint must be dismissed.[19]

THE REMEDY

Having found Respondent to have engaged in certain unfair labor practices, specifically with regard to its prohibition of the distribution of union campaign material, I find that it must be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. The affirmation action shall require Respondent to notify employees of the rights guaranteed them by Section 7 of the Act as set forth in the notice which it will be required to post.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Wholesale & Retail Food Distribution, Teamsters Local 63, affiliated with International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By entirely prohibiting the distribution of campaign materials published by candidates for elective union office, Respondent has violated Section 8(a)(1) of the Act.

4. The Quality Circle Group is not a labor organization within the meaning of Section 2(5) of the Act.

5. General Counsel has failed to prove by a preponderance of the evidence, any other violation of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Vons Grocery Company, Santa Fe Springs and El Monta, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Imposing a total prohibition on employees wishing to distribute campaign materials published by candidates for elective union office.

(b) In any like or related manner threatening, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its distribution centers in Southern California where its drivers are represented by the Union (including, but not limited to, to the distribution centers located in Santa Fe Springs and El Monte) copies of the attached notice marked ''Appendix.''[21] Copies of the notice on forms provided by the Regional Director for Region 21 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

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[19] *E. I. du Pont & Co.*, 311 NLRB 893 (1993).

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''